2006 WL 4058844 (Mich.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Michigan,
17th Circuit Court.
Kent County

Beatrice J. EVANS, Plaintiff/Counter-Defendant,
v.
Thomas J. EVANS, Defendant/Counter-Plaintiff.

No. 04-08388-CZ.
January 30, 2006.

Plaintiff/Counter-Defendant's Response to Defendant/Counter-Plaintiff's Motion for Summary Disposition

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Honorable Donald A. Johnston.

INTRODUCTION

This case is of **elder abuse** by a son against his mother. The son, Defendant/Counter-Plaintiff ("Defendant"), used undue influence, fraud and coercion to persuade his 83-year old mother, Plaintiff/Counter-Defendant ("Plaintiff"), to sell him her home of 57 years; the home she built with her husband and where she raised her nine children ("the Property"). Once Plaintiff realized she had been defrauded, she and her other children tried to persuade Defendant to rescind the transfer. These attempts proved futile and so did negotiations with counsel.

Over the years, Defendant also engaged in a course of conduct where he stole, removed, and/or destroyed Plaintiff's personal property, harassed and manipulated her, invaded her privacy, trespassed in her home, created unsafe living conditions, and, as a result, caused her great emotional distress.

Plaintiff is suing Defendant for fraudulent misrepresentation, breach of fiduciary duty, and undue influence with respect to the transfer of her Property, and for conversion, invasion of privacy, intentional infliction of emotional distress, nuisance, statutory trespass/unlawful interference with property, and invalidation of contract pursuant to MCL 55.307(2).

In response, Defendant filed a seven-count counter-suit against his mother for conversion, invasion of privacy, intentional infliction of emotional distress, nuisance, unjust enrichment, and damage to personal property, and now files this Motion for Summary Disposition.

STATEMENT OF FACTS

In 1995, Defendant began pressuring his mother to let him move back into her home; she repeatedly told him that she did not want him living with her. (See Exhibit 1, Plaintiff's Answers to Interrogatories). At the time, Defendant worked, owned his own

home, and owned a several rental properties. Defendant later sold his home and then, on January 12, 1996, when Plaintiff was away from her house, moved into the upstairs portion of her home. Plaintiff had not given him permission to do so. (Exhibit 1).

At the time, Plaintiff's daughter Martha was living in the upstairs portion of the house. She gave her mother money for rent and helped around the house. After Defendant moved in, he moved all of Martha's belongings and furniture into the living room and left them there. (See Exhibit 2, Affidavit of Martha Marra).

Things were very strained between Plaintiff, Martha and Defendant, and Martha eventually moved out of the Property. Defendant continued to live with his mother. He did not pay rent or utilities for the first two years that he lived with Plaintiff; her utility costs doubled during this time.

Before and after he moved in, Defendant began to pressure his mother to sell the house to him. He would always do this out of the presence of his eight siblings. (Exhibits 1 and 2). Plaintiff resisted Defendant's pleas for almost two years; she told Defendant and her other children that she did not wish to sell her home to him. (Exhibit 2). Defendant later told his sister Ruth that, “He was going to buy mom's house.” Ruth told him that their mom did not want to sell it to him. Defendant said he was going to, “Make mom sell her house to me otherwise she'll never do it.” (See Exhibit 3, Affidavit of Ruth Ann Nozal).

Defendant told Plaintiff that he had to buy her house because he needed to defer the capital gains he made on the sale of his house two years ago. He told his sister Ruth the same thing. (Exhibit 3). On December 10, 1997, Defendant came to Plaintiff with a contract all ready to sign. He begged Plaintiff saying, “You've got to sign the contract.” He lied and said that, “He didn't have the money to pay the taxes.” (Exhibit 1). Defendant pressured his mother to sell the property; he wouldn't take no for an answer. Defendant convinced Plaintiff to go with him to attorney Susan Flakne's office to execute a land contract. (See Exhibit 4, Land Contract dated December 10, 1997). Ms. Flakne drafted the land contract. She also acted as a notary and witness to Plaintiff's signature on the land contract she drafted. (Exhibit 4).

Plaintiff felt very uncomfortable about going to this meeting, but Defendant kept pressuring her, stating that he needed her help. Neither Defendant nor Ms. Flakne explained to Plaintiff what she was signing or offered her an opportunity to confer with her own counsel prior to engaging in this transaction. Neither the contract terms nor price were discussed with Plaintiff. Plaintiff felt pressured by both Ms. Flakne and Defendant to sign the land contract. (Exhibit 1). Plaintiff's other children did not know that she was going to sell her house to Defendant or see a lawyer that day to sign a contract. (Exhibit 2).

Defendant set the contract price at $90,142.00. (Exhibit 4). He invented a $15,142.00 down payment, which was comprised of gifts he had given to his mother over the years, including a trip to Europe they took over 20 years ago, that he now was characterizing as “loans” that needed to be repaid. Upon information and belief, $15,142.00 is the approximate, if not exact amount, Defendant netted from the sale of his house and needed to shelter in taxes.

The remaining $75,000.00 was to be paid in a $22,000.00 lump payment by January 10, 1998, and then in monthly installments of $645.00 or more, plus interest, until the balance was paid off in full. (Exhibit 4). Defendant did not make complete, timely payments to Plaintiff pursuant to the contract; he did not make any interest payments. When making his monthly payments, Defendant would simply sign over rent checks from his tenants to his mother.

Shortly after Defendant persuaded Plaintiff to sign the land contract, he started removing her personal belongings from the house without her knowledge or permission. To this day, Plaintiff does not know where many of her personal belongings are. Defendant would remove his mother's property when she was not present in the house. (Exhibits 1 and 2). Several of Plaintiff's items were found in the second floor. Defendant kept the door at the end of the stairwell between the first and second floors locked. There is an outside staircase to the second floor leading to a separate entrance.

Plaintiff asked Martha to put a lock on her bedroom door to protect her important documents and papers. Defendant noticed the lock on the bedroom door *the very same day it was installed,* as he called his sister Mary in a rage. (See Exhibit 5, Affidavit

of Mary Jo Camfferman). He knew of the lock the same day it was installed because he made a practice of checking all of the rooms in the house, even Plaintiff's bedroom. Defendant told his sister Beth that he had gotten into his mom's locked bedroom; he thought it was funny. (See Exhibit 6, Affidavit of Elizabeth Wyn).

Plaintiff did not like living with Defendant. He created an atmosphere of control and tension. He would reprimand Plaintiff for washing dishes too early in the morning, for turning up the heat, and for having too much "junk." One time he came downstairs and unplugged Plaintiff's space heater while she was using it, because of electricity costs. He would say, "This is my house, my yard, my driveway." (Exhibit 1).

In December 2002, Plaintiff was diagnosed with breast cancer. Plaintiff had surgery in January 2003 and then underwent treatment, which included chemotherapy and radiation. Plaintiff was very tired and confused during this time. Exhibits 1 and 2). Even though Defendant lived with Plaintiff, her other children were primarily responsible for taking care of her; they missed work to take her to her to chemotherapy and radiation treatments, doctor appointments, and emergency room visits. To outsiders, Defendant would brag about how much he was caring for his mother (Exhibit 5), but to his family, he would complain that they were all babying their mother and that he was not going to do that. (Exhibit 5s).

During her illness, Defendant began removing more of Plaintiff's personal property. Plaintiff's other children would find some of her belongings in the trash. (Exhibit 2). An itemized list of missing personal property is attached. (See Exhibit 7, List of Personal Property). Prior to Defendant moving into the house, Plaintiff's basement and garage were full of her personal property; now these areas are virtually empty. (Exhibits 1 and 2). One time, Plaintiff and Martha had packed up items for a garage sale only to come back later and find everything was thrown out. Plaintiff broke down and cried. (Exhibits 1 and 2). Plaintiff was very upset about her missing property and confronted Defendant as to its whereabouts, to which Defendant first denied taking anything, and then later stated that his mother's things were old anyway and that she did not use them. He often said that she had too much junk. (Exhibit 2).

Defendant claims that he paid off the land contract in full on January 24, 2002, when he tendered a check for $4,111.00 after selling his car. There was no notation on the check so indicating; there was never any notation or formalization that the debt was paid in full. Even though he claims he paid off the contract in full, Defendant waited until a year later and a half later to get the deed to the Property.

On August 4, 2003, merely a few days after Plaintiff finished her radiation treatments, Defendant came crying and begging to get her to sign a warranty deed to the Property; he said, "They will put me in jail, please sign, I'm going to jail if you don't sign!" Defendant said that, "The family would never sign off on the house." (Exhibit 1).

Plaintiff now believes that Defendant was afraid she was going to die from cancer soon, and therefore he needed to obtain the deed because his other siblings would contest the transfer to him. (Exhibit 1). Defendant told his mother that he had paid off the land contract, which he had not. Defendant then produced a deed that Ms. Flakne had drafted. (See Exhibit 8, Warranty Deed dated August 4, 2003). As a further inducement to sign the deed, Defendant typed up a life lease and assured his mother that she could live in the entire Property for the rest of her life for free. Defendant subsequently typed up another life lease that only granted Plaintiff the use of the lower half of the Property, which is the only life lease known to still be in existence. (See Exhibit 9, Life Lease dated August 5, 2003).

As a result of her cancer treatments, Plaintiff had lost her hair and did not often leave the house. However, that day, Plaintiff once again acquiesced to her son's pressure. She put a turban on her head and went to the Steelcase Credit Union to sign the deed in the presence of a notary. As a result of the treatments, Plaintiff's eyesight had been compromised, she was suffering from radiation bums and blisters on her skin, and lacked her usual energy.

Plaintiff did not understand the documents she was signing, she did not have an opportunity to review them prior to signing, and she was not in a proper mental state to be making decisions affecting her Property. (Exhibit 1). Defendant assured her that

he paid off the land contract, but he had not. After the parties returned from the credit union, Defendant threw his hands up in the air and said, “Its mine,” referring to the Property. At that moment, Plaintiff knew that she had been duped. (Exhibit 1). Defendant told his sister Martha, “I ripped off ma so bad she didn't even see it coming,” “I feel so good about it,” “I have this house, I have four houses, plenty of money and everything I want,” “I've ripped off ma blind and I laugh about it,” and that “She trusted me.” (Exhibit 2).

Plaintiff's doctor, Peter Lundeen, M.D., was aware of her mental and physical condition during the time of the deed transfer. His medical opinion is that because Plaintiff was undergoing intensive treatment for cancer, and experiencing significant side effects that left her physically and emotionally overwhelmed, it likely caused her to have impaired judgment that could have caused her to make decisions that she would not have made in her normal state. (See Exhibit 10, letter from Dr. Peter Lundeen, M.D., dated August 13, 2004).

Plaintiff asked Defendant for a copy of the life lease the day she signed the deed, and he refused to give it to her. She asked for it again days later and he said, “No, you'll just use it against me.” (Exhibit 1). Then Defendant claimed that the life lease did not exist at all; he never gave Plaintiff a copy of it. Defendant denied its existence to Wyoming Police Officers (Exhibit 2), family members, and even in his answer to Plaintiff's Complaint. It was only during this lawsuit and the course of discovery, that Defendant finally acknowledged that he had typed up a life lease and he produced a copy of it. (Exhibit 9).

However, this is not the original document Defendant drafted, as it only grants Plaintiff a life lease to the “lower main floor unit,” and is dated August 5, 2003, a day *after* the parties went to the credit union. It was August 4, 2003, that Plaintiff signed the deed, and Defendant drafted the original document to say that Plaintiff had a life lease to the whole house; this was part of the inducement to get her to sign the deed.

On or about October 30, 2003, Defendant moved out of the Property. The first thing Plaintiff told her daughter Mary Jo was, “I'm free!” Unfortunately, even though he moved out, Plaintiff has described her existence as living under the Gestapo. (Exhibit 1).

After Defendant moved out in October, Plaintiff became concerned that she had not received a gas bill by February 2004. According to a DTE employee, on October 20, 2003, Defendant called and requested that they shut off the heat. (Exhibit 2). He never told DTE that his mother was still living there; fortunately they had not shut off the heat. Plaintiff did not know that she was responsible for paying the heat as no bills were ever sent to her. She later found out that she had a bill of approximately $866.00. (Exhibit 1).

The only shower in the house was on the second floor. While they lived together, Defendant never let Plaintiff use the upstairs, including the shower, so he put in a shower in the basement for his mother to use. After Defendant moved out, Mary Jo put up a shower rod in the bathroom upstairs so that her mom could take a shower in a nicer, warmer place. Defendant saw it and told Mary Jo, “That ain't happening.” Then he shut the water off to the upstairs. (Exhibits 1,2 and 5).

Around the time this lawsuit was filed, Plaintiff was on the phone with her daughter Mary Jo, when she saw Defendant outside her window and panicked. She did not want to let him inside the house. Mary drove over to the Property and went up to the door. Defendant tried to get in the home while Mary Jo was entering. She told him their mother did not want him inside but he said he was coming in anyway. Instead of going in, Mary Jo went to her car and told her mom not to unlock the door until Mary Jo called back on her cell phone. The police were called and some of Plaintiff's other children came over. Defendant told the police that he had to get something from his house. He could have gone through the second floor door. Plaintiff's other children told the police that Plaintiff had a life lease. They asked Defendant about it and he said there is no life lease, but he lets his mom stay there for free. (Exhibits 1, 2 and 4). The police have been called to the Property several times regarding complaints of Defendant's trespassing. (See Exhibit 11, Wyoming Police Department Complaint Summary with Narrative dated December 7, 2004).

Defendant locked his mother out of the upstairs and the basement. (Exhibits 1 and 2). Even though he did not live at the Property, Defendant continually went into Plaintiff's mailbox and retrieved her mail, under the pretenses that he was still getting his mail there. (Exhibit 2). He would come inside her living area and leave her mail on her counter.

Defendant also manipulated windows, screens, and locks to secure future entry into Plaintiff's portion of the Property. Plaintiff put her own locks on the interior door to the upstairs to keep Defendant out on five different occasions; each lock was removed by Defendant. (Exhibits 1 and 2).

Plaintiff had an appointment scheduled on her calendar for 1:00 p.m. on December 17, 2003. The appointment was changed, but not on the calendar. Plaintiff and Martha left around the same time and returned shortly thereafter; Defendant's car was in the drive. Later that day, some of Plaintiff's other children inspected the Property and noticed evidence of tampering with window locks. (Exhibits 1 and 2).

The next day, Defendant came to the Property, Plaintiff let him in, he chatted for a while, and then he suddenly got up, reached into Plaintiff's purse, took her keys and said, “Nobody will lock me out of my house,” and went to make a copy of the keys. He came back, threw Plaintiff's keys in her purse, and left. (Exhibit 1).

On February 15, 2004, Plaintiff changed the back door lock prior to leaving for Florida so that Defendant could not enter her home while she was gone. On February 18, 2004, Plaintiff's daughter Beth went to the Property to retrieve her mail as requested and could not enter the back door because Defendant had drilled into the lock of the doorknob. There was no mail in the mailbox. (Exhibit 6). Plaintiff's daughter, Ruth, called Defendant and told him to bring Plaintiff's mail back. Defendant said that he would continue taking her mail whenever he chose to do so. Plaintiff's son Paul called the Wyoming Police department. After the police arrived, they called Defendant and warned him about his behavior.

Upon her return from Florida, Plaintiff's children noticed that it was unusually cold in her house. The heating ducts had been opened to the upstairs. Plaintiff purposely closed the upstairs ducts to save money. Defendant also manipulated the circuit breaker box while she was gone. (Exhibits 2 and 6). On March 13, 2004, Plaintiff blew a fuse in the house. Her daughter Beth went to the basement to check the circuit breaker box. She could not open it; the cover had been rigged. It had to be pried open with a screwdriver. Once she opened it, Beth noticed that all of the breaker labels that helped to identify switches were blackened out with a marker. (Exhibits 2 and 6).

On August 14, 2004, Plaintiff left the Property about 2:30 p.m. When she returned about 8:00 p.m., she noticed that her living room curtains were opened. The interior door to the upstairs portion of the house had been bolted from the inside of the stairwell; screws measuring one and a half inches were poking through on Plaintiff's side of the door. The railings up the stairs had been removed. All but three downstairs windows were unlatched, a folding door was removed from a locked downstairs bedroom, the garage window was broken, and a lock was removed from the side door to the Property. The police were called again. (Exhibits 1 and 2). Plaintiff has obtained a quote for all of the property damage over the years, which totals $665.19. (See Exhibit 12, Itemized Quote from Menards).

When Defendant came to the Property while Plaintiff *was* there, he would first check the upstairs, then go down to the basement, and end up in Plaintiff's living area. He would look around her home, look through her mail, and say things to her like, “I'm watching you,” and “I know everything that happens.” (Exhibit 1).

As a result of his actions, at least seven of Defendant's other siblings no longer have contact with him and he is not invited to family functions; his other siblings support their mother in pursuing the return of her Property. (Exhibit 2).

As a result of Defendant's behavior, Plaintiff feels like a prisoner in her own home. Sometimes after Defendant made his “visits”, Plaintiff literally could not function. (Exhibits 1 and 2). Her mental and physical health has deteriorated as a result of the stress she has endured due to Defendant's behavior. (Exhibit 2). While he lived with his mother, Defendant constantly pressured her to

do things she did not want to do and controlled her home life. After he moved out, Defendant created an atmosphere of anxiety and fear by dropping by both while she was away and at home. Defendant changed Plaintiff's door locks, jimmied her windows, boarded the door to the second floor, and did other bizarre things in an attempt to create an atmosphere of fear and control. (See Exhibit 13, Photograph of bloody “hand and wrist” by entrance to second floor of Property).

Defendant took advantage of his mother's age, illness, weak state of mind, and his relationship with her, in order to control her and get her personal and real property. The transfer of the Property should be voided and Plaintiff should be returned as the rightful owner of her home of 57 years. Plaintiff's personal property should also be returned or she should be compensated for it. She should also receive monetary damages for Defendant's invasion of her privacy, trespass, nuisance, and above all, for his infliction of emotional distress upon his mother.

Defendant's Motion for Summary Disposition should be denied in its entirety and a jury should be allowed to determine the facts of this case.

STANDARD OF REVIEW

A motion for summary disposition pursuant to MR. 2.116(C)(10) tests whether there is factual support for a claim. When deciding such a motion, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law. *Allen v Keating,* 205 Mich App 560, 562; 517 NW2d 830 (1994). Summary disposition is proper when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). The courts liberally find a genuine issue of material fact exists. *Duran v Detroit News,* 200 Mich App 622, 628-629; 504 NW2d 715 (1993). With respect to each count in Plaintiff's complaint, there are issues of material facts in dispute.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) on Plaintiff's claim of nuisance. MCR 2.16(C)(8) tests whether a claim is sufficient as a matter of law. In other words, the court deciding the motion determines whether the plaintiff's pleadings allege a prima facie case.” *Garvelink v Detroit News,* 206 Mich App 604; 522 NW2d 883 (1994). Plaintiff has successfully plead a prima facie case of nuisance.

LAW AND ARGUMENT

I. DEFENDANT MADE FRAUDULENT MISREPRESENTATIONS TO GET PLAINTIFF TO TRANSFER HER PROPERTY TO HIM

Defendant requests summary disposition under (C)(10) by arguing that he did not make *any* representations to Plaintiff to buy her Property, or if he did, then they were true. Plaintiff's complaint, her answers to interrogatories, the attached affidavits, and facts as summarized from those documents, set forth the fraudulent misrepresentations.

Defendant told Plaintiff that he would be in financial trouble (capital gains taxes) if Plaintiff did not sell her house to him on land contract, that he didn't have the money to pay them. (Exhibit 1). This was untrue, as Defendant made a profit on the sale of his house, he owned several rental properties, and never paid rent to his mother. Defendant also states in his affidavit that he did not have to buy his mother's house; he could have bought another property. Yet, at the time, he told his mother that he had to buy her property or he'd have to pay capital gains taxes.

While undergoing radiation treatment for cancer, Defendant cried and begged Plaintiff to sign the deed; he told her that he would go to jail if she did not sign the deed over to him. (Exhibit 1). He lied and told her that the land contract was paid in full. Defendant kept no accounts payable ledger, check registers or bank statements to show payments. Defendant attaches as exhibits to his brief copies of handwritten statements and cashier's checks as proof of payment. It should be noted by the court

that many of the cashier checks attached to Defendant's brief are duplicates of the same check, and others predate this transaction by 10-20 years, having nothing to do with the payment of the land contract whatsoever. As for the individual payments, there is an approximate $9,000 discrepancy between what Defendant claims he paid monthly and what Plaintiff collected from him.

Finally, Defendant induced Plaintiff to sign over the deed by stating that she would have a life lease in the Property if she did what he said. He later told Plaintiff there was no life lease and denied the existence of the life lease to the family, police, and in his answer to Plaintiff's complaint until he was forced to produce it through discovery.

Defendant knew that his representations were false when he made them and he intended that Plaintiff rely on the representations in order to get her to transfer her Property. Plaintiff's reliance upon those statements was the basis for executing the land contract and warranty deed. As a result of Defendant's fraudulent misrepresentations, Plaintiff has also suffered economic losses; she no longer legally owns the Property and was never fully compensated for it.

In this case, there is an issue of material fact as to whether there were any representations made, fraudulent or not. Only a jury can determine whom to believe as to whether the statements were made under MCR 2.116(C)(10). If the jury believes that statements were made, they must also determine whether they were material to the transfer of the Property, they were false, they were intentionally made to induce Plaintiff's reliance, that Plaintiff relied, and that she was damaged as a result.

Defendant also argues that Plaintiff cannot sit on her right to sue. Plaintiff did not sit on her right to sue; she first became aware of Defendant's fraud in August 2003 and has attempted to retrieve her property ever since.

II. DEFENDANT BREACHED HIS FIDUCIARY DUTY TO PLAINTIFF

Defendant argues that no fiduciary duty existed between the parties. However, Defendant is only analyzing “fiduciary duty” in the formal sense. This ignores case law that states that a fiduciary relationship exists when there is a reposing of faith, confidence and trust and the placing of reliance by one upon the judgment and advice of another. *Williams v Griffin*, 35 Mich App 179; 192 NW2d 283 (1971). In *Van't Hof v Jemison*, 291 Mich 385; 289 NW 186, (1939), the Michigan Supreme Court defined a confidential relationship as, “One founded on trust or confidence reposed by one person in the integrity and fidelity of another ... The term is a very broad one... *The rule embraces both technical fiduciary relations, and those informal relations which exist whenever one man trusts in and relies upon another.”* (Emphasis added).

In *Connor v Harris*, 258 Mich 670; 242 NW 804 (1932), primarily a case of undue influence by a sister who persuaded her sibling to devise her everything in her will, the court also found a fiduciary relationship existed, based on the sibling's physical condition, dependence upon her sister's advice, the sister's “avariciousness and desire” to get control of the property, the exclusion from contact with others, the sister's lack of disclosure as to the contents of the documents, and the sister's agreement to pay for the changes in the will.

The facts are parallel to the instant case. A fiduciary relationship existed in this case based on the mother/son relationship, the fact that the parties resided together, that Defendant continually discussed the sale of Plaintiff's property, made representations and promises, and subsequently, entered into a real estate transaction with Plaintiff. Plaintiff trusted her son; she relied on his statements concerning a legal matter -- the transfer of her Property.

The Michigan Supreme Court found a fiduciary relationship between parent and child in *Grondziak v Grondziak*, 12 Mich 61; 162 NW2d 354 (1968). In that case, the court held that a fiduciary relationship existed between the parents and one of their several children in the negotiation of a deed transfer. There “was sufficient evidence to establish a confidential relationship between the defendants and the deceased grantors at the time the deed was executed.” *Id.* at 548. The court further held that defendants had the burden of proving “the fairness of this deed and to show that the mother understood the significance of it.” The court held that defendants had not sustained that burden, and it entered a judgment canceling, annulling and setting aside the warranty deed.

There are issues of material fact as to whether Defendant breached his fiduciary duty to his mother. Therefore, pursuant to MCR 2.116(C)(10), Defendant's motion should be denied.

III. DEFENDANT USED UNDUE INFLUENCE TO GET PLAINTIFF TO TRANSFER HER PROPERTY TO HIM

The law presumes undue influence in a transaction where evidence establishes existence of a confidential or fiduciary relationship between grantor and fiduciary, the fiduciary benefits from the transaction, and the fiduciary had an opportunity to influence grantor's decision with regard to the transaction. *Habersack v Rabaut,* 93 Mich App 300; 287 NW2d 213, (1979).

A confidential and fiduciary relationship existed between the parties as stated above. Defendant benefited from the transaction; he obtained ownership of the Property and did not pay the contract price or any interest, or arguably a fair market price. He also invented a “down payment” by recharacterizing gifts to his mother as loans that had to be repaid, again paying less than was owed.

Defendant had opportunity to influence Plaintiff's decision to transfer the property; he created it through a series of calculated steps. First, he moved in so he could be near his mother and be alone with her; he made life so unbearable for Martha that she moved out of the Property; the conversations about the Property transfer were always out of the presence of Plaintiff's other eight children. Once he was in her home, Defendant was in a position to place constant pressure on her. He was able to wear down her resolve using sympathy, lies, and threats of financial troubles and jail.

In the case of *Noban v Shoup,* 171 Mich 191; 137 NW 75 (1912), a 75 year-old father deeded all of his real estate to only one of his sons, in turn the son gave the father a life estate. The Michigan Supreme Court stated that it saw no reason why the father would have deeded all of his estate to one son to the exclusion of the other. It said that the record was “replete with testimony that ... Shoup regretted his act almost immediately after he made the deed.” It was immaterial whether the father was induced to sign the deed based on an agreement to let him live on the property for life. “The situation of the father, his extreme age, and his condition, both mental and physical, were such as to impose upon the son the obligation to guard most carefully his father's interests and to abstain from driving any bargain to his own advantage. *Id.* at 194.

When one family member is in a fiduciary relationship with his parent and receives almost all of her property, he must establish a right to it and demonstrate that he has not acquired the property improperly. In *Grondziak,* supra, the parents deeded almost all of their property to one of several children. Similarly, Plaintiff has nine children, all of whom stand to inherit the Property, yet through his actions, Defendant now is the sole titleholder. He will not be able to show that he obtained the property rightfully.

Plaintiff, at 80 years old, was suffering with cancer. Defendant feared that his mother was dying and needed to obtain the deed to the Property prior to this because his siblings would vigorously contest his ownership. While she was recuperating from radiation treatments, Defendant came to Plaintiff one day crying and begging her to sign over the deed. Defendant told Plaintiff that he would go to jail if she did not transfer the Property; that the other kids would contest his ownership. He lied and told her that the land contract was paid in full when it was not. He promised that she would have a life estate in the Property and live there for free forever if she executed the deed. Defendant later denied the existence of the life estate to his mother, his siblings, the Wyoming Police, and he denied the existence of a life estate in his answer to Plaintiff's Complaint. Defendant has been caught in a lie, which discredits the rest of his defense and case.

The court in *Hill v Haiston,* 299 Mich 672; 1 NW2d 34 (1941), added that undue influence can also be presumed where it appears that the party, because of advanced age, poor health, or reliance on another, is unable to exercise free agency.

Plaintiff was in a weakened physical and mental condition; she was taken in by Defendant's lies and manipulated through sympathy for her son. She relied on his representations; she was unable to exercise free agency.

Defendant argues that Plaintiff was competent, coherent and wanted to sell the property to her son, based on both his and Susan Flakne's observations. [1] Plaintiff denies that she ever saw Susan Flakne before or after the day she signed the contract, she denies that she willingly sold her house to Defendant; issues of material fact exists as to what happened during the land contract transaction. Furthermore, Plaintiff is not claiming that she was incompetent or incoherent during the transaction; she is suing because she was defrauded, pressured, manipulated, and taken advantage of, which are very different things.

There are issues of material fact as to whether Plaintiff sold her property on the basis of undue influence. Therefore, pursuant to MCR 2.116(C)(10), Defendant's motion should be denied.

IV. DEFENDANT CONVERTED PLAINTIFF'S PERSONAL PROPERTY

Defendant claims that Plaintiff is "generally unable to name any specific items or offer conclusive confirmation that Defendant bears the responsibility for the item(s) [sic] alleged conversion."

However, through discovery, Plaintiff provided Defendant with a two-page typed list of missing property. As for "conclusive confirmation" that Defendant took the property, that is an issue for the jury to decide, it is not the standard for a motion for summary disposition.

Plaintiff and other witnesses state that Defendant took her belongings and that he admitted to it. (Exhibits 1 and 2). There are issues of material fact as to whether Defendant converted Plaintiff's personal property. Therefore, pursuant to MCR 2.116(C)(10), Defendant's motion should be denied.

Interestingly, Defendant counter-sued Plaintiff for conversion with similar proofs, yet he claims there are no issues of material facts in Plaintiff's case.

V. DEFENDANT HAS COMMITTED STATUTORY

TRESSPASS/UNLAWFULINTERFERENCE WITH PLAINTIFF'S POSSESSORY INTEREST IN THE PROPERTY

Defendant only argues statutory trespass in his motion; Plaintiff is suing under both statutory and common law theories of trespass. To sue under the statute, Defendant argues that the parties have to have a landlord/tenant relationship that depends on a contractual relationship between owner and possessor wherein consideration is exchanged for the right to occupy the property, and that there is no contractual relationship.

The Michigan Supreme Court stated in *Butler v Bertrand*, 97 Mich 59; 56 NW 342 (1893), that the existence of title in one person and possession in another creates the presumption of a tenancy. Defendant, albeit through his fraud and undue influence, held title to the property and Plaintiff possessed it.

Furthermore, Defendant gave Plaintiff a life lease. (Exhibit 9). The court in *Van Alstine v Swanson*, 164 Mich App 396; 417 NW2d 516 (1988), stated that a life lease entitles the *tenant* to possession, control, and enjoyment of the property to the exclusion of the remainderman. (Emphasis added). As for consideration, Plaintiff transferred the deed to her property in exchange for a life lease; consideration between the parties existed.

MCL 600.2918 governs actions for unlawful interference with possessory interests.
Unlawful interference includes: the removal, retention, or destruction of personal property of the possessor, a change, alteration, or addition to the locks or other security devices on the property without forthwith providing keys or other unlocking devices to the person in possession, the boarding of the premises which prevents or deters entry, the removal of doors, windows, or locks, causing, by action or omission, the termination or interruption of a service procured by the tenant or which the landlord is

under an existing duty to furnish, which service is so essential that its termination or interruption would constitute constructive eviction, including heat, running water, hot water, electric, or gas service, and the introduction of a nuisance.

MCL 600.2918(1)(a-g).

Defendant engaged in all of the above conduct; he took Plaintiff's personal property, changed locks, boarded doors, and terminated gas service to the Property without Plaintiff's knowledge. The statutory cause of action applies in this case.

In order to establish a common law case of trespassing, a plaintiff must show that defendant interfered with her possession of the property, he committed a physical act of invasion onto the property, that he intended to trespass on plaintiff's property, and his intentional act caused the invasion. *Rogers v Kent Board of County Road Commissioners*, 319 Mich 661; 30 NW2d 358 (1948). *Isle royale Mining Co v Hertin*, 37 Mich 332; (1877). *Difronzo v Port Sanilac*, 166 Mich App 148; 419 NW2d 756 (1988). *Tittiger v Johnson*, 103 Mich 437; 303 NW2d 26 (1981).

Plaintiff is in possession of the Property, as she owns it and resides there; she is also the holder of a life lease. Both while he lived there and after he moved out, Defendant would enter Plaintiff's separate living area unbeknownst to her and without her permission. Defendant intended to enter Plaintiff's separate living area without her permission, sometimes physically breaking in, breaking locks, doing damage to door jambs, doors, and windows. As stated above, a life lease entitles the tenant to possession, control, and enjoyment of the property to the exclusion of the remainderman. *Van Alstine*, supra Defendant had no legal basis to be in Plaintiff's area of the house.

There are issues of material fact as to whether Defendant's actions committed a statutory and/or common law trespass. Therefore, pursuant to MCR 2.116(C)(10), Defendant's motion should be denied.

VI. DEFENDANT INVADED PLAINTIFF'S PRIVACY

Of the four types of Invasion of Privacy, intrusion upon seclusion, solitude, or private affairs is the applicable category of tortuous conduct in this case. The elements include: an intrusion by the defendant, into a matter in which the plaintiff has a right of privacy, by a means or method that is objectionable to a reasonable person. *Lewis v Dayton-Hudson Corp.*, 128 Mich App 165; 339 NW2d 857 (1983).

Defendant argues that Plaintiff has not proffered any specific private subject matter, that Plaintiff never said Defendant could not be in the house, and that there was no lock on the door separating the two floors to the Property.

Defendant repeatedly entered Plaintiff's private living area without her permission, while he lived in the Property and after he moved out, and looked through her personal papers, mail, and belongings; he broke through Plaintiff's locked bedroom door to get into her safe. Plaintiff had an expectation of privacy in her own home and personal papers, and therefore, a right to privacy. She repeatedly tried to exercise this right by putting locks on her areas of the Property. These intrusions were outrageous and objectionable to Plaintiff. Whether the intrusion is objectionable to a reasonable person is a factual question for a jury. But arguably, many people would find it objectionable for a son to invade his mother's personal space and effects against her will, especially after she repeatedly attempted to secure her privacy by putting locks on doors. Again, a life lease entitles the tenant to possession, control, and enjoyment of the property to the exclusion of the remainderman. *Van Alstine*, supra. Defendant had no legal basis to be in Plaintiff's area of the house. Defendant's invasion of Plaintiff's privacy has caused her to suffer extreme emotional distress.

There are issues of material fact as to whether Plaintiff had a right to privacy and whether Defendant violated that right. Therefore, pursuant to MCR 2.116(C)(10), Defendant's motion should be denied.

Interestingly, Defendant counter-sued Plaintiff for invasion of privacy with similar proofs, yet he claims there are no issues of material facts in Plaintiff's case.

VII. THROUGH DEFENDANT'S INTENTIONAL ACTIONS, PLAINTIFF HAS SUFFERED EMOTIONAL DISTRESS

Defendant argues that Plaintiff is in remarkable health and therefore her count for intentional infliction of emotional distress should be dismissed. He cites no authority in support of this supposition. In order to establish a prima facie case, Plaintiff has to show that Defendant intentionally engaged in extreme and outrageous conduct that caused severe emotional distress. *Physical injury does not have to be established.* (Emphasis added). *Dickerson v Nichols,* 161 Mich App 103; 409 NW2d 741 (1987). However, Plaintiff is now being treated for high blood pressure and cholesterol, which started in 1996, when Defendant moved in.

Defendant's conduct toward his mother is so outrageous that is goes beyond all possible bounds of decency and would be regarded as utterly intolerable in a civilized society. *Linebaugh v Sheraton Michigan Corp,* 198 Mich App 335; 497 NW2d 585 (1993). *Roberts v Auto Owners,* 422 Mich 594; 374 NW2d 905 (1985). *Moore v City of Detroit,* 252 Mich App 384; 652 NW2d 688 (2002). *Doe v Mills,* 212 Mich App 73; 536 NW2d 824 (1995).

Defendant's actions have caused Plaintiff severe emotional distress and anguish. Plaintiff no longer enjoys a close, trusting relationship with her son. Her family is divided. Plaintiff has been living for almost 10 years with Defendant's pressure, manipulations, control, and bizarre behavior. She no longer feels safe or comfortable in her home of 57 years. She is an 83 year-old lady who worries about where she will live in the future; she worries if Defendant will try to get into her house again. Defendant's behavior occurred before, during, and after she struggled with cancer, which arguably could not have helped her physical health either.

Defendant argues that Plaintiff cannot recover emotional distress damages in an action for breach of contract. This is true. Unfortunately, breach of contract has not been plead in this case. It is Defendant's argument that is “fatally flawed,” not Plaintiff's.

There are issues of material fact as to whether Defendant's actions are extreme and outrageous and whether Plaintiff suffered severe emotional damage. Therefore, pursuant to MCR 2.116(C)(10), Defendant's motion should be denied.

Interestingly, Defendant also counter-sued Plaintiff for conversion with similar proofs, yet he claims there are no issues of material facts in Plaintiff's case.

VIII. DEFENDANT'S ACTIONS CONSTITUTED A NUISANCE

Defendant argues that Plaintiff's allegations as they relate to a cause of action for nuisance are “baseless” and “predicated on conjecture.” However; Defendant sued for nuisance in his counter-suit. Whether Defendant's behavior, or Plaintiff's, for that matter, constitutes a nuisance is a fact question for the jury.

Nuisances are classified in various ways. The facts in this case relate to a private, intentional nuisance. A private nuisance is an unreasonable interference with an individual's use and enjoyment of land. *Adkinis v Thomas solvent Co,* 440 Mich 293; 487 NW2d 715 (1992). An intentional nuisance is created by conduct intended to bring about conditions that constitute a nuisance. *McCracken v Redford Township,* 176 Mich App 365; 439 NW2d 374 (1989).

While Defendant lived at the Property and after he moved out, he unlocked and unsecured windows and doors in Plaintiff's living area, removed and/or destroyed locks to windows and doors on the outside and inside of the Property, manipulated the

heating temperature and service to the Property, locked Plaintiff out of her basement and second floor, blocked entry into the circuit breaker box in the basement, removed labels on the fuses, removed Plaintiff's personal property, broke windows, and removed safety railings to the upstairs. Defendant's activities constituted a nuisance to Plaintiff.

Defendant claims that Plaintiff cannot show damage. Defendant's actions have directly and proximately caused Plaintiff substantial damage. Defendant's activities have damaged Plaintiff by creating potential dangers and general disruptions while living at the Property, loss of enjoyment of her Property, disruption to Plaintiff's life, damage to her personal property, damage to the Property itself, and causing emotional distress, including difficulty in carrying on normal activities.

There are issues of material fact as to whether Defendant's actions created a nuisance. Therefore, pursuant to MCR 2.116(C)(10), Defendant's motion should be denied. Defendant also argues for dismissal under MCR 2.116(C)(8). Plaintiff has plead a prima facie case of a private nuisance.

IX. INVALIDATION OF CONTRACT PURSUANT TO MCL 55.307(2)

A court may invalidate any document not notarized in compliance with the Notary Public Act. MCL 55.307(2). The Act, MCL 55.291(2)(a), prior to its 2004 amendment, states that a notary public shall not perform a notarial act upon any record executed by her.

Defendant's real estate attorney, Ms. Flakne, drafted the land contract transferring the Property at issue in this case. (Exhibit 3). She also acted as a Notary to Plaintiff's signature and witnessed both parties' signatures on the land contract. (Exhibit 3). Because the attorney notarized Plaintiff's signature on a contract she drafted, the Court may invalidate the land contract between the parties.

While it may be a question of law, not fact, as to whether there has been a violation of the Notary Act, Plaintiff maintains that, as a matter of law, Ms. Flakne should not have notarized a contract that she drafted.

X. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON HIS COUNTERCLAIMS

Defendant, in response to his mother's lawsuit, filed his own seven-count counter-claim; however, he is only seeking summary disposition on two counts: intentional infliction of emotional distress and unjust enrichment.

a. Intentional Infliction of Emotional Distress

It is important to note that Defendant's allegations are directed to Plaintiff *and/or her agents,* by whom he means his other siblings. Defendant attributes the alleged wrongdoings to his siblings, but he is only suing Plaintiff.

In order to establish a claim for Intentional Infliction of Emotional Distress, Defendant has to show that his 83 year-old mother intentionally engaged in extreme and outrageous conduct that caused severe emotional distress. *Dickerson v Nichols,* 161 Mich App 103; 409 NW2d 741 (1987).

Defendant has failed to set forth any intentional actions *by Plaintiff* that were so extreme and outrageous so as to cause his alleged emotional distress. In his brief, he states that he has incurred emotional distress based on "extreme and outrageous conduct *permitted by Plaintiff* and inflicted on the Defendant *by other family members.*" (Emphasis added). Again, Defendant is suing the wrong people.

Defendant should be denied summary disposition on this count because he has failed to prove that there are not issues of material fact as to whether Plaintiff engaged in any outrageous and extreme conduct and, even if she did so engage, that it is the cause of his emotional distress.

Plaintiff denies that she engaged in any such conduct, and argues that Defendant has sued the wrong party. Furthermore, Plaintiff maintains that any emotional distress suffered by Defendant is self-inflicted. After all of the outrageous, vindictive, mean-spirited, and greedy behavior he has engaged in against his 83 year-old mother, it is no wonder he is emotionally distressed. Defendant claims that he has suffered mental and physical injury, but attaches no supporting documentation to his brief. Even if Defendant can show bills for counseling, upon information and belief, he has been in counseling for several years prior to this incident.

b. Unjust Enrichment

In order to be granted summary disposition on his count of unjust enrichment, Defendant must show that there is no issue of material fact as to whether a benefit was conferred upon Plaintiff for which she has been unjustly enriched.

Defendant defrauded Plaintiff out of her home and now seeks to be compensated for rent. As part of the inducement to transfer the Property, Defendant granted Plaintiff a life lease; he said she could live in the Property free for the rest of her life. Defendant holds title to the Property; Plaintiff has a life lease. Defendant has not paid the entire contract amount for the Property and he lived in it for two years without paying rent. There is no unjust enrichment here.

CONCLUSION

There are issues of material fact to be decided by a jury in each of Plaintiff's causes of action and she has successfully plead a prima facie case of private nuisance; therefore, Defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and (C)(8) should be denied.

In turn, there are also issues of material fact to be decided in Defendant's claims of intentional infliction of emotional distress and unjust enrichment; therefore, Defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) should also be denied.

Dated: 1/30/06

Rutgers & Mackraz PLC

By: <<signature>>

Kim Boersma Crozier (P59557)

Attorney for Plaintiff

Footnotes

1 It must be pointed out that Susan Flakne only witnessed Plaintiff sign the land contract, not the deed, therefore her testimony does not bear on the other instances of fraud, breach of fiduciary duty, and undue influence for which Plaintiff is suing.

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